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No. 457

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

C. J. ADAMS *alias* CHARLIE ADAMS,
Petitioner,

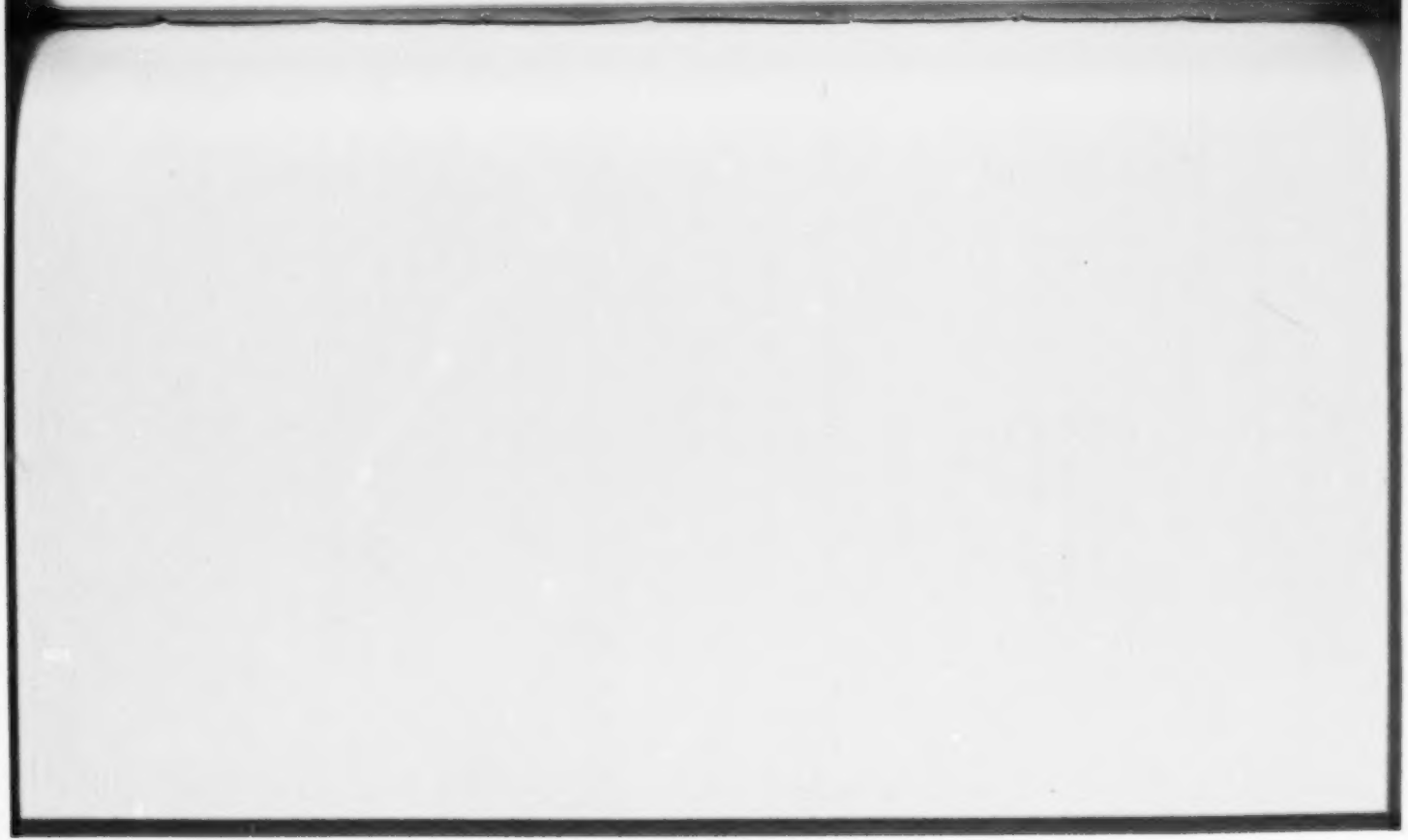
v.

UNITED STATES OF AMERICA,

BRIEF FOR PETITIONER

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C. J. ADAMS *alias* CHARLIE ADAMS,
Petitioner,

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UNITED STATES OF AMERICA,

BRIEF FOR PETITIONER

THE OPINIONS OF THE COURT BELOW

The majority and dissenting opinions of the Circut Court of Appeals for the Fifth Circuit are reported in 156 Federal (2d) page 271, Advance Sheets. Copies of such opinions are appended to the petition for the writ of certiorari, (Page 18-25): and also appear in the record. (R. 136-142). No opinion was rendered in this case by the District Court.

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Section 347). The judgment of the Circuit Court also rendered on the 9th day of July, October 1946, (R. 143) application for rehearing therein was denied by the Circuit Court on the 5th day of August, 1946, (R. 147). Certiorari was granted by this Court on October 21st, 1946.

STATEMENT OF THE CASE

The Petitioner (a negro Notary Public) was indicted with Walter Towns and Carrie Lee Towns (Negroes) in the District Court of the United States for the Southern District of Alabama, Northern Division, May Term, 1945, on three counts—Counts 2, 4 and 6 (R. pp. 2-9)—for unlawfully aiding, counseling and abetting John Towns and Samuel B. and Samuel C. Towns (twins), sons of Walter and Carrie Lee Towns, to unlawfully and knowingly fail and neglect to present themselves for registration on September 19, 1944, under the Selective Service and Training Act of 1940, as amended (U. S. Code, Title 50, Appendix Sec. 303-318); and, under Count 7 (R. pp. 9-17), for conspiring together and with said three sons of said co-defendants to cause said three sons to knowingly and unlawfully evade registration under said Act by falsely pretending that each of said sons was under 18 years of age.

In the conspiracy Count, the only overt acts alleged to have been committed by the Petitioner were:

> (a) the signing by him, as a Notary Public, of a certificate that he had examined a family Bible in the possession of Carrie Lee Towns, the mother of said Negro boys, which was published by Collins Clear Type Press, in which the year of publication was not shown, which Bible showed that each of said sons had been born at Pleasant Hill, Alabama, and showed the date of birth of John Towns as October 9, 1928, and the date of birth of Samuel C. and Samuel B. Towns (the twins) as June 9, 1930, and that the name of the father was Walter Towns and the name of the mother was Carrie Lee Towns; and that said facts appeared to have been recorded many years ago; and
>
> (b) administering the oath or taking the acknowledgments of the three sons and the mother in the affidavits stating the age of each of said sons. (R. pp. 9-17).

It is alleged that such certificate and affidavits were thereafter filed with the Bureau of Vital Statistics, Alabama State

Department of Health, for the purpose of obtaining delayed birth certificates for said three sons of said co-defendants.

The co-defendants, parents of the three Negro boys, plead guilty to the indictment, and thereafter, on November 7, 1945, the Petitioner, who plead not guilty, was tried before a jury who found him guilty as charged in the indictment. (R. p. 32).

On November 9, 1945, Petitioner was sentenced for one year and a day and fined $250.00

Petitioner thereupon filed a motion to set aside the verdict and grant a new trial. (R. pp. 34-43), which motion (as amended) was overruled on November 21, 1945. (R. pp. 43-44).

On November 21, 1945, Petitioner took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. pp. 44-47).

The judgment appealed from was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on July 9, 1946 (R. pp. 143). Application for rehearing in said cause was denied on August 5, 1946 (R. pp. 147).

The evidence showed that Carrie Lee Towns, the mother, and her three sons, John, Samuel B. and Samuel C. Towns appeared before the Petitioner as a Notary Public for the purpose of making affidavits as to the dates of birth of the Towns boys. The mother first came to see Petitioner on March 23rd, 1944, (R. 111). On the first day of her visit on March 23rd, 1944, she filled out the affidavits relating to her son John; and came back on March 24th when she filled out the affidavits relating to the twins, Samuel B. and Samuel C. Towns. The Towns boys came in and executed their affidavits before the Petitioner as a Notary Public on March 25th, 1944 (R. 111). The family Bible in the possession of Carrie Lee Towns was presented to the Petitioner as a Notary Public on March 23rd, 1944, for his examination and to obtain a certificate from Petitioner as a Notary Public with reference to his examination of the Bible and the record of the dates of birth therein (R. 14). The affidavit of Carrie Lee Towns with reference to John Towns was

executed March 23rd, 1944 (R. 13). The affidavit of Carrie Lee Towns with reference to Samuel B. and Samuel C. Towns was executed March 24th, 1944 (R. 13). The affidavits and the notary's certificate relating to the Bible and the record therein were executed in connection with an application to the Bureau of Vital Statistics, State Health Department of the State of Alabama, for the issuance of what are termed as "delayed birth certificates" where no birth certificate was issued at the time of birth, pursuant to the provisions of Section 39, Title 22, Code of Alabama of 1940, as amended by general acts of Alabama of 1943, page 463.

The certificate executed by Petitioner as a Notary Public reads as follows:

> "I, C. J. Adams, a Notary Public in and for said state and county hereby certify that I have this day examined the Family Bible now in the possession of Carrie Lee Towns which was published by Collins (fol. 140) Clear-Type Press in the year of year not shown and the facts below appear to have been recorded many years ago. The Bible shows John Towns to have been born at Pleasant Hill, Ala.; date of birth Oct. 9, 1928; name of father Walter Towns and name of mother Carrie Lee Towns."

In the blank space in which the year of publication of the Bible was to be inserted, the Petitioner inserted the words "year not shown". Upon the trial it is shown that the Bible though not containing a date of publication, on the second page, in very fine print, showed that the license for the publication of the Bible was issued in the year 1939, February 13, 1939, or March 10, 1939. This appeared in such small print that many people could not have read it without enlargement (R. 99, 110, 142).

The Petitioner testified that he looked for the date of publication in the Bible but did not see any date, and did not discover the date of the issuance of the license appearing on the second page in such fine print and therefore inserted in the certificate the words "year not shown" (R. 110).

The date of the birth of John Towns as stated in the affidavits and as recorded in the Bible was October 9th, 1928. The date of the birth of the twins Samuel B. and Samuel C. Towns as stated in the affidavits and as recorded in the Bible was June 9th, 1930 (R. 14, 15). On the trial it was shown that the twins, Samuel B. and Samuel C. Towns were born some time in 1923 (R. 74) and that John Towns was older than the twins but the correct date of his birth was not shown.

Although it was shown that the delayed birth certificates were thereafter obtained by these three boys, and were used by them in attempting to evade registration under the Selective Service and Training Act, it was not shown that the Petitioner, the Notary Public, had any knowledge at the time of administering the oaths to the affidavits and making his certificate as to the Bible record that the facts stated in the affidavits were false or that the records in the Bible were unture.

The evidence shows that Petitioner had no previous acquaintance with the mother, Carrie Lee Towns, beyond the taking of her acknowledgment to an affidavit made by her before him as a Notary in February 1944 (R. 112, 113), but which affidavit is not questioned in this case. The three Towns boys were unknown to Petitioner previous to the time they appeared before him to sign and swear to their affidavits on March 24, 1944.

The Petitioner, as a Notary Public, was paid the regular Notary fees for his services, amounting to $3.00, and so far as the evidence shows he had no other connection with the events that later transpired.

There was no direct evidence of any criminal act or conspiracy on the part of the Petitioner.

There was no evidence that the Petitioner, the Notary Public, had any knowledge of the fact that the informaton stated in the affidavits or recorded in the Bible was false.

Thereafter the Petitioner testified as a witness for the Government in prosecutions instituted against the Towns boys for attempting to evade the draft, in which said boys were con-

victed. Subsequent to the conviction of the Towns boys, o June 16, 1945, before the indictment in this case, Petitione made a written statement to a Special Agent of the Federal Bu reau of Investigation with reference to the affidavits made be fore him and the certificates executed by him, (R. p. 95) whic contained no statement as to how old the Towns boys appeare to be in March, 1944 when they appeared before Petitioner t sign their affidavits. However, this Special Agent testifie that after he had taken such written statement, the Petitione made the remark, or stated orally, referring to the Towns boy that "you *can* look at them and tell they were over 18"; (R. p 96) and later testified that the words the Petitioner used o that occasion were "you *could* look at them and tell they wer over 18" (R. 97). H. L. Dickerson, Chief of Police of the City o Selma, testified for the Government that he was present at th time these statements were made by Petitioner to the F. B. I Agent, and that in replying to an inquiry as to the appearanc of the Towns boys and how old Petitioner thought they were he said he thought they looked like they were over 18 years i his opinion. (R. 97-98). This testimony was contradicted b Petitioner, who testified that he told the F. B. I. Agent that i his opinion the Towns boys were over 15 years of age on th date they appeared before him in March, 1944, but Petitione explained that such opinion was not formed by him until after wards when he saw these boys at the time of their trial on charge of evading the Selective Service and Training Act, i which case Petitioner had testified for the Government.

There was no direct evidence tending to show that the Peti tioner was guilty of aiding or abetting the Towns boys in failin or neglecting to register under the Selective Service Act, o that he conspired with anyone to evade the registration of th Towns boys pursuant to such act.

It was shown that the Petitioner had been convicted of a prio offense (R. 106, 117, 137), involving a charge that Petitione as a Notary Public had made a false certificate in connectio with a claim presented to the Veterans Administration for th payment of money. Evidence of this prior conviction was ad

missable for the purpose of impeaching the Petitioner as a witness but the trial Court charged the jury that it should also be considered by them for the purpose of determining the Petitioner's guilty knowledge in the case at bar (R. 125).

In order to obtain the delayed birth certificate it was necessary for the applicants to submit to the State Health Department supporting proof from two documents not less than one year old. (See Appendix)

One of the supporting documents was the family Bible submitted to the Petitioner as a Notary Public for his examination. The other documentary proof submitted by applicants to the State was a baptismal record from Good Hope Church, Pleasant Hill, Alabama, signed by Cleveland McBride, Custodian of such records. (R. 77, 79). The baptismal record was certified on March 24, 1944 (R. 79). The certificate as to the baptismal records submitted in support of the application for delayed birth certificates showed the same dates of birth as set forth in the affidavits and as recorded in the family Bible. It was shown that the baptismal records were false (R. 80, 81). However, it was not shown that the Petitioner had anything to do with certifying the baptismal records or had any knowledge of such records or of the certificate with reference thereto.

ASSIGNMENT OF ERRORS.

1. The Court below erred in affirming the judgment of the trial Court.

2. The Court below erred in not holding the evidence was wholly insufficient to support the verdict of the jury or the judgment of conviction entered thereon by the District Court.

SUMMARY OF ARGUMENT

I.

Facts and circumstances as consistent with innocence as with guilt are not sufficient proof of guilt, and will not support a verdict of guilty.

The facts and circumstances of this case are of such nature Petitioner's only connection with the transactions consisted of acts performed by him in his official capacity as a Notary Public; (a) the ministerial act of administering oaths to affiants, in affidavits setting forth the date of births of the Towns boys facts unknown to him except as represented by the statements of the mother and the boys and as shown by the Bible record; and (b) an act judicial in its nature, in certifying to the State authorities the result of his examination of the family Bible. His failure to discover any date in the publication of this Bible was so certified to the State authorities. It had no date of publication therein, although the date of the issuance of the license for publication did appear in a different place in very fine print. This the Petitioner testified he did not discover. He was not familiar with the Bible; the Towns family were practically strangers to him; he did not know the ages of the boys; he was not related to them; he received only the usual Notary fees and nothing occurred at the time to arouse his suspicion that a deception was being perpetrated by the Towns family. He did not form any definite opinion of the ages of the Towns boys until he had seen them subsequently, when he testified as a witness for the Government in prosecutions against the Towns boys; and his statement to the FBI agent with reference to their apparent ages was not made until after he had observed the Towns boys on this subsequent occasion, when their ages was a question involved in the prosecutions.

Even if the Petitioner had discovered and inserted the date of 1939 as the date of publication of the Bible, so far as the evidence shows, the State authorities would nevertheless have issued the delayed birth certificates to the Towns boys, since the

State only required that such documentary evidence should have been in existence for one year previously.

Petitioner's prior conviction of a different offense was not a circumstance of guilt of the second crime, the one having no logical connection with the other.

The conflict in testimony between the Petitioner and the F. B. I. agent was not of sufficient consequence to change the aspect of otherwise innocent acts. This conflict related to an oral statement made by Petitioner of his recollection of the apparent ages of the Towns boys when they first appeared before him in 1944. But the Petitioner explained that this statement was based upon his subsequent observation of the Towns boys, when he appeared as a Government witness in the prosecutions against them.

II.

Inference may not be piled upon inference to a degree not supported by proven circumstance or basic fact.

There was no direct proof of Petitioner's guilt. To find any basis for an inference of guilt it would be necessary to infer from Petitioner's statement to the F. B. I. agent, a statement made fifteen months afterwards, and after he had seen the boys on a second occasion, when their ages were facts involved in their prosecutions, that he not only became suspicious that a fraud was being attempted, but discovered the fraud and, instead of stopping or reporting it, joined in its commission, and that without any apparent motive or reason. Such a conclusion would require the basing of inference upon inference, or presumption upon presumption, to a degree not permitted.

III.

The acts of Petitioner in taking the affidavits, a ministerial duty, the performance of which was done for the benefit of the public, did not make him responsible for the contents of the affidavit.

The falsity of an affidavit raises no implication against the Notary. To the contrary, the presumption of law is that the Petitioner, as a public official, faithfully performed the official duty imposed upon him.

IV.

In certifying the result of his examination of the family Bible, Petitioner, as a Notary Public, was acting in a judicial capacity; and there is a presumption of law that such act was faithfully done in the performance of his official duty to the State and to the general public.

Such presumption was not overcome by merely showing that through oversight or negligence he had failed to discover and include in his certificate a date which was displaced and appeared in such fine print that it was difficult to read.

The presumption protecting an officer from civil or criminal liability in the performance of a judicial function is primarily designed to secure to the public a fearless administration of law. Sinister implications may not be cast upon judicial acts, merely by proof of an erroneous conclusion or the occurence of a natural oversight or ommission.

V.

Evidence of the prior conviction of Petitioner for another offense, involving moral turpitude—of issuing a false certificate to obtain money on a claim against the Veterans Administration—although admissible for the purpose of impeaching Petitioner as a witness, did not tend to prove that Petitioner was guilty of the crime charged in the case at bar, involving an attempt of the Towns family to prevent the registration of the Towns boys under the Selective Service Act. Such evidence is not admissible under the general rule, and does not come within any of the exceptions to this rule. The exceptions are carefully restricted for the reason that evidence of this nature is deemed to be highly prejudicial; and has the effect of deny-

ing the defendant the right to be tried in accordance with the rules provided by law. The court improperly instructed the jury to consider such other conviction for the purpose of determining guilty knowledge or guilty intent of the Petitioner with respect to the charge upon which he was being tried.

ARGUMENT

I.

Facts and circumstances as consistent with innocence as with guilt are not sufficient to form the basis of a presumption of guilt, or to support a verdict of guilt.

The facts and circumstances of this case are of this nature, for the following reasons:

(1) Petitioner had not previously known the Towns boys; and his only previous acquaintance with the mother was when he as a Notary Public took her acknowledgment to an affidavit on February 9th, 1944. ((R. 112-113)

(2) The official acts performed by Petitioner are presumed to have been done in good faith, in furtherance of his duty to the State and to the public, in one instance ministerial, the other judicial; and a mere oversight or erroneous conclusion on the part of such official creates no basis for an inference or presumption of criminal intent.

(3) Petitioner's duty, at the time, was not to ascertain and certify his judgment of the ages of the Towns boys, but specifically to examine the documentary evidence submitted to him, namely: The record in the family Bible, and to certify the dates of birth as recorded therein, the appearance of the Bible, and the date, if any, of its publication. This he did, and we believe the Court will agree with us that it was correctly done. It was technically correct. His failure to discover or certify the date of the issuance of a license to the publisher for the

publication of the Bible is a circumstance as consistent with innocence as with guilt, for the reasons that:

(a) The date of the issuance of the license was not the date of publication. The Bible was printed in Great Britain (R. 110) and no date of publication was shown.

(b) The date of the issuance of the license was in print so fine that it could not be easily read.

(c) He was not familiar with this Bible, never having seen it before.

(d) Nothing had then occurred to arouse his suspicion that the Bible record was false.

(4) Petitioner was not responsible for the truth of falsity of the statements contained in the affidavits.

(5) Petitioner's casual observation of the Towns boys at the time was not sufficient to create any suspicion on his part.

(6) It was not until he saw the Towns boys in Court months afterwards, when he appeared as a witness for the Government in the prosecution against them, that he formed any definite opinion of their ages. (R. 105, 114)

(7) Petitioner's statement to the FBI agent as to his idea or impression of the ages of the Towns boys, whether he said 18 or 15 years, cannot be twisted into a confession of guilt. (For further discussion of this incident, see pages 16-18 of brief.)

(8) None of the alleged co-conspirators testified to any conspiracy, or to any circumstance tending to connect Petitioner with any conspiracy, or tending to show any guilt on his part.

(9) The appearance of the Towns boys as witnesses in November 1945, one year and eight months after their appearance before Petitioner in March 1944, in view of the natural growth and development of the boys, could not have afforded reliable proof that Petitioner had any other concern with the matter than the performance of his official duties as a Notary Public. (R. 114)

(10) Evidence that Petitioner had previously been convicted of an offense involving moral turpitude (R. 117) was only relevant for the purpose of impeaching the Petitioner as a witness. It was not a similar offense admissible as an exception to the general rule of exclusion. (The Court's erroneous charge on this point is discussed on pages 21-23 of this brief.)

(11) Petitioner had been a Notary over 20 years. (R. 116) and was a veteran of World War I. (R. 105)

(12) It was shown that the Petitioner in his capacity as a Notary executed similar documents for as many as between 500 and 600 birth certificates in 1944, (R. 105) principally in connection with employment in defense plants, and he is not shown to have been informed that the Towns boys certificates were for any specific purpose.

These circumstances, when reduced to their natural and normal proportions, are found to be too flimsy to support a charge of guilt. Nor does their hue change from that of innocence to guilt when viewed in combination or sequence with other facts and circumstances relating to the Petitioner. His entire connection with the events is shown to have been limited to the execution before him of the affidavits and the execution by him of the certificate, all done in his capacity as an official of the State of Alabama.

There are only two circumstances in this case which we deem of sufficient consequent to merit discussion: (1) The ommission or error to insert the date of the license issued for publication of the family Bible; and (2) The statement of Petitioner to the FBI agent expressing his opinion or recollection of the apparent ages of the Towns boys.

Any possible probative force of the first of these circumstances as a proof of guilt was completely destroyed by proof that the date of publication was not shown, and that the date of the issuance of the license for publication appeared at an unusual place and in very fine print.

The statement to the FBI agent instead of being construed

as an admission of a guilty knowledge, when viewed in its proper light, is the mere expression of an opinion, or an attempt to recall or relate an impression of the ages of the Towns boys, gathered from their appearance. The fact that Petitioner had later seen the Towns boys at their trial, in which he appeared as a Government witness, was, as he related, used as a basis for forming and expressing his opinion of their apparent ages when they appeared before him to sign and swear to their affidavits, in March, 1944.

While it may be proper to weigh these two circumstances together, and not merely separately, we insist that the first circumstance, as a circumstance of guilt, was so thoroughly explained and therefore denuded of any sinister aspects, that it is not revived as a circumstance of guilt by a conflict in testimony relating to a statement made by Petitioner in an attempt to recollect or relate his impression of the ages of these boys, or to give the FBI agent an opinion thereon.

In this connection it is pertinent to consider what would have been his acts if he had been a co-conspirator. If he had discovered and inserted in his certificate the date of the issuance of the license as the date of the publication—1939—there is not one scintilla of evidence to show that the State authorities would not have readily issued the delayed birth certificates. To the contrary, the undisputed proof showed that the State only required documentary evidence as much as one year old. (R. 114). On the reverse side of Form VS-4, referred to by the witness, and which is a form published and issued by the Alabama State Board of Health—Board of Vital Statistics, it is stated:

> "Any two of the types of records listed below may be used to prove your date and place of birth provided they are *at least one year old and bear your name and contain the proof.*"

And this statement is reiterated therein in the following words:

"No document less than one year old will be accepted as proof."

(See Appendix "A" for a full copy of printed instructions appearing on the reverse side of said Form VS-4).

If the Petitioner had been a co-conspirator, his statement to the FBI agent would doubtlessly have been merely to the effect that he did not notice the boys sufficiently at the time to form any definite opinion of their ages.

The fact that he had seen them later and the fact that he was apparently in sympathy with their prosecution and the prosecution of other members of their family, and had no thought of his own guilt in connection with the transaction, doubtlessly accounted for the fact that he attempted to express a definite opinion or view as to their apparent ages when they first appeared before him. His statement was certainly not the kind of answer which one would expect to have been made by a co-conspirator to an FBI agent. Its very frankness, notwithstanding the conflict in evidence as to whether Petitioner on that occasion said they appeared to be over 15 or over 18 years of age, is more indicative of innocence than of guilt. Even though Petitioner stood impeached as a witness, his explanations of the original incident and the effect of his subsequent opportunity of forming an opinion as to the ages of these boys, so coincide with reason and the probabilities of innocence, that it is difficult to conceive of the conversion of these incidents into badges of guilt. And the F. B. I. agent had forgotten whether the point was covered by the written statement taken from Petitioner, and had to rely upon his memory. (R. 94)

In the case of *Tingle v. U. S.* (CCA 8) 38 Fed (2d) 573, 575, involving a charge of conspiracy, the Court held:

"When the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value."

The rule that circumstantial evidence as consistent with innocence as with guilt will not support a conviction rests upon reason and authority. For a statement of the rule, see 16 Corpus Juris, pages 763, 764, (Sec. 1568).

On this point also see the following cases:

Cox v. United States, 96 F (2d) 41, 42, 43.

Langer v. United States, 76 F (2d) 817, 827.

Dahly v. United States, 50 F (2d) 37.

Gunning v. Cooley, 281 U. S. 90.

Sturns v. The White Clay City, 285 U. S. 195.

Stevenson v. Mutual Life Insurance Co. of New York, 87 F (2d) 441, 443.

New York Life Insurance Company v. King, 93 F (2d) 347, 353.

Spalitto v. United States, 39 F (2d) 939, 942.

Carson v. United States, 62 F (2d) 261, 274.

II.

Inference may not be piled upon inference to a degree not supported by proven circumstance or basic fact.

We do not believe that the Petitioner implied in his statement to the FBI agent, with reference to the apparent ages of the Towns boys, when they appeared before him as a Notary to sign and swear to their affidavits, that he had actually discovered their deception or had then concluded from their appearance that they were so far advanced in years that the dates of birth related by the mother and recorded in the family Bible were false.

Petitioner was not confronted with any charge. He apparently sympathized with the prosecution, after he had been informed that a deception had been practiced, and that upon him

as an official as well as upon the State and Federal governments, and after having observed the boys, at the time of their trial, with a definite view of determining what their ages would have been if the dates of their births as sworn to before him and as recorded in the Bible had been true.

His explanation of the entire occurrence coincides with the truth, the probabilities, and the normal and usual procedure of such an incident or event.

Therefore, the entire case for the prosecution is seen to hinge upon an accurate recolletion of Petitioner's statement to the FBI agent, its significance, and the inferences or presumptions which may be based thereon.

Before we can find any basis for an inference of guilt in the statement, we must conclude that Petitioner intended or meant by the statement not only that he had originally observed the Towns boys sufficiently to form a definite opinion of their ages as compared with what their ages would have been if the evidence of dates of birth submitted to him had been true; but that he did at that time form such an opinion; that from the difference or disparity which he then observed he not only should have become suspicious but did become suspicious and thereupon actually discovered that a deception was about to be practiced upon him, as the first public official encountered by the parties, and upon the State, and probably the Federal government; and, having, discovered the attempted deception, instead of stopping or reporting it, he then and there joined the criminals in a conspiracy to complete the deception and commit the criminal act which it involved, although he was not related to them and only received the regular Notary fees. This would involve piling inference upon inference, or presumption upon presumption to a degree not permitted.

That the statement was not an admission of guilt is clear, for no charge or intimation of guilt was confronting him when it was made. It had none of the elements of a confession of guilt. It did imply that after being informed of the deception practiced upon him, and after seeing the Towns boys upon the oc-

casion of their trial, the Petitioner upon reflection realized for the first time that the boys did appear to be older than their dates of birth as represented would have indicated, had he made the necessary computation or comparison when they appeared before him in March 1944, but which is refuted by the fact that he only saw them momentarily at that time, and had not previously known them.

But there is a vast difference between a subsequent realization, and admission, that there was something in the appearance of a deceiver which should have aroused, but for some reason did not arouse, one's suspicion, and an admission or confession by a person that he had discovered a deception and with guilty knowledge had aided in its consummation.

It is obvious that Petitioner's statement to the FBI agent was not intended as an admission of guilt, was not a confession of guilt, and was not an inadvertent admission of guilt.

The FBI agent at the time did not deem the remark of sufficient consequence to put it into the written statement he took for the Petitioner. He erred, on the trial, in first testifying that it was included in the written statement. It is therefore not unreasonable to doubt his positive attitude that the age stated was "18" instead of "15" as testified by Petitioner. Such a conflict in the testimony of the witnesses as to their recollection of this oral statement should not be accepted as reliable proof of the *corpus delicti*, the conspiracy, and to charge the aspect of every other incident and circumstance from that of innocence to guilt—and that to a degree *beyond a reasonable doubt*. We do not believe that the statement made by Petitioner to the FBI agent, even if removed from conflict, is sufficiently clear to overcome the presumption of innocence and the additional presumption of faithfulness attending an official in the performance of his duties to the public. (See *Dahly v. United States*, 50 F (2d) 37, *supra*.)

III.

Petitioner as a State Official, a Notary Public, in taking the

affidavits was not responsible for the truthfulness or falsity of their contents.

As a public official, a Notary Public, it was the duty of Petitioner to administer the oath to each affiant and to certify that he had done so. This he did. This was a ministeral duty, a duty which he owed to the public. The falsity of the contents of the affidavits, without more, is not a circumstance which lends support to any inference of guilt.

(See dissenting opinion by Waller, Circuit Judge, R. 141, 142)

To the contrary, there is a presumption of law that the acts of a public official were faithfully done in the performance of his official duty. (See *Dahly v. United States*, 50 F(2d) 237; *Dunlop v. United States*, 165 U. S. 486; and *Williams v. Weaver*, 100 U. S. 547.)

IV.

Petitioner, as a Notary Public, in certifying the result of his examination of the Family Bible was acting in a judicial capacity; and there is a presumption of law that his acts were faithfully done in the performance of his official duty.

It has been held that a Notary Public, in examining parties with reference to their execution of conveyances and other instruments, and in certifying to the facts of such acknowledgments, acts in a judicial capacity. (See *Orendorff v. Suit*, 52 So. 744; 167 Ala. 563, *Byrd v. Bailey*, 53 So. 773, 169, Ala. 452, and *Moore v. Bragg*, 103 So. 452, 212 Ala. 481.) Likewise, in examining the family Bible and in certifying to his findings with respect thereto, and the record of births appearing therein, the Petitioner, as a Notary Public, was acting in a judicial capacity, and is not liable civilly or criminally for an error, omission or mistake in certifying his findings, conclusions or judgment. (See *Williams v. Weaver*, 100 U. S. 547.)

It is a rule of law based upon reason and public policy. The

interest of the public demands this protection to public officials in the performance of their official duties. In fact, the primary purpose of the rule affording protection to public officers in the performance of their duties is designed to secure a fearless administration of the law. (See *Cooper v. O'Connor*, 105 F (2d) 761, and *Booth v. Fletcher*, 101 F. 667, certiorari denied, 307 U. S. 628.)

If the rules were otherwise, an officer of the law, particularly a Notary Public, would be deterred or hindered in the performance of his duties, which would seriously interfere with the demands of the public.

When applying the proper construction and presumption of law attending the execution of this official certificate by Petitioner, it is inconceivable that an error or omission therein should be construed as a circumstance of guilt, when it would not have supported a civil action for negligence.

In making this certificate, the official was not required or permitted to express any opinion as to the ages of the Towns boys. He was limited to certifying the result of his findings from an examination of the Bible and the record therein.

Furthermore, there is no proof, and it may not be assumed, that the birth certificates would not have been issued, as readily as they were issued, if the Petitioner had discovered and inserted in the certificate the year 1939, the date of the issuance of the license, as indicating the date of publication of the Bible. The published instructions on the State's Form VS-4 (Appendix page 25) expressly provide for the acceptance of documentary evidence as much as one year old. In other words, it affirmatively appears that the insertion of the year 1939 in the certificate would have met the State's requirements—and that more specifically than a certificate which did not show any date of publication. That the Bible had the appearance of such age when examined by Petitioner was not disputed. Also, it is common knowledge, and the State authorities apparently so recognize, that many families in subsequent years purchased

Bibles of various dates in which family history—births and deaths—are recorded. The rule and practice shown to have been adopted or promulgated by the State of Alabama did not require that the Bible should have been published before the date of the births of the persons whose records are recorded therein.

V.

Evidence of the prior conviction of Petitioner for a different offense, involving moral turpitude, although admissible for the purpose of impeaching Petitioner as a witness, did not tend to prove guilt in the case at bar.

Evidence of prior conviction for another offense was admissible for the purpose of impeaching the Petitioner as a witness. The prior offense involved a charge of falsely certifying as a Notary Public that a person who was actually deceased appeared before him to make a demand for payment of money by the United States or the Veterans Administration. (R. 139). However, such evidence was not a circumstance tending to prove the Petitioner guilty in the case involved; and the trial court erred in charging the jury to the effect that such prior conviction should be considered for "two purposes", and in referring to the second purpose the court said:

> "Another purpose it may show is what we call guilty knowledge—we call it in the law scienter, on the theory that the man who knows how to do a thing, may do it more quickly. You simply weigh that when you consider all this testimony, to determine whether or not it could apply to this particular defendant or any defendant, in your case it is this particular defendant." (R. 125).

The general rule excludes evidence of a conviction of another crime wholly independant of the crime for which defendant is on trial, even though it is a crime of the same court. (See 16 Corpus Juris, page 586, section 1132; 20 Am. Jur. page 293-

298, sections 313-316; and Jones on Evidence, section 243, *et seq.*)

The exceptions to the general rule are carefully restricted (16 Corpus Juris 587, 588, Section 1133; 20 Am. Jur. page 298, 316), since such evidence, if not clearly admissible, is highly prejudicial.

Cases in which it was first admitted were cases of uttering forged papers and other fraud (16 Corpus Juris 587, Annotation No. 1 (a)).

Other similar offenses may be shown when they tend to establish a common scheme or plan, to show guilty intent or guilty knowledge. But when criminal intent is inferred from the proof of an act, other like offenses will not be admitted (20 Am. Jur. page 295, 296). There must be a legal connection between the two crimes, so that one tends to prove the other (20 Am. Jur. page 298, Section 316).

Certainly, proof of a former conviction for obtaining money under false pretenses or making a false certificate to obtain money, does not tend to prove a subsequent charge that the Petitioner participated in a crime to prevent registration under the Selective Service Act. It was not shown that Petitioner received anything other than the regular Notary fees. His patriotism was not questioned. He was shown to have been a veteran of World War I.

Proof of a former crime under these circumstances did not tend to disprove a natural and normal oversight in failing to discover the displaced fine print of the date of the issuance of the licenses to publish the Bible, but was sufficiently prejudicial to produce an unwarranted conviction.

In the case of *Boyd v. United States*, 142 U. S. 450, 458, it was held that proof of a former crime, though of the same nature, "afforded no legal presumption or inference as to the particular crime charged", but tended to prejudice the defendants before the jury and to deny them "the full benefit of the rules pre-

scribed by law for the trial of human beings charged with crime".

Exceptions to the general rule are discussed in the following cases:

Wood v. United States, 16 Peters 342, 360;
Standard Oil Company v. United States, 221 U. S. 1, 76;
Heike v. United States, 227 U. S. 131, 145;
Niederluecke v. United States, 21 Fed (2d) 511, 513;
Marshall v. United States, 197 Fed 511, 515.

In *Niederluecke v. United States*, 21 Fed (2d) 511, 513, it was held:

"The rule is that such evidence (of another crime) should never be received unless it is clear the commission of the one offense tends by a clear and rational connection of the offenses to prove the commission of the other." (Citing authorities).
(See 8 R. C. L. page 206, where the rule is stated.)

If the prior offense was committed for money, it raises no presumption that the second offense was committed for money. The evidence is that he received nothing but his regular Notary fees. He was not related to the Towns family. They were practically strangers to him. To infer guilt from proof of the prior offense would require the basing of presumption upon presumption, which is not permitted. (*Niederluecke v. United States*, 21 Fed (2d) 511, 513. See also: *Wagner v. United States*, (CCA) 8 Fed (2d) 581, 586, and cases there cited.)

CONCLUSION

When consideration is given to the facts that members of the Towns famliy were practically strangers to the Petitioner, the Notary Public; that the only acts performed by him were required to be performed by him as a public official; that he owed these duties to the general public; that he received only the regular Notary fees; that the only act which he did which war-

ranted careful scrutiny involved a natural and normal oversight or ommission in a judicial certificate, which was explained; that even if the year 1939 had been inserted as the date of the publication of the Bible the State authorities, pursuant to rules adopted by them, would as readily have issued the delayed birth certificates; and that his opinion of the apparent ages of the Towns boys when they appeared before him in March 1944 was not formed until he had seen them again when he appeared as a Government witness in the prosecution against them; such facts and circumstances appear as cosistent with innocence as with guilt. When the proper rules of law and construction are applied to the facts and circumstances of this case, we believe that it will be clearly seen that the evidence is wholly insufficient to support the verdict of guilt. The verdict of guilt may only be explained by the prejudice engendered by instructions of the court to consider his former conviction of a distinct or different crime as sufficient proof of guilty participation in the criminal acts of others, probably aided by an excess degree of patriotism felt by the jurors at the time of the trial (November 1945) against any act involving disloyalty to our Country in time of war.

For these reasons we believe the verdict and judgment of guilt should be set aside and the cause reversed.

Respectfully submitted,

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APPENDIX

INSTRUCTIONS FOR RECORDING DELAYED BIRTH CERTIFICATES

1. Certified copies issued are pictures of the certificate that you prepare and which we keep as a permanent record. Writing must be clear and legible so that the photostatic pictures can be made. Make correct entries—*no change will be made on the delayed certificate after it is recorded in this office.*

2. After filling in the information about yourself and your parents, go before a notary public and sign the first affidavit. *This affidavit is to be made only by the person whose birth is to be recorded.* If you cannot write, have the notary public sign for you and you place your "X" mark over your name. When relatives are making out a record of birth for a person who is deceased or who is now in foreign service, this affidavit need not be made. Instead, write "Registrant not living" or "Not available—in foreign service" across the face of this affidavit.

3. Get someone who has *known you all of your life* to make the second affidavit before a notary public. This person may be either a relative or someone not related to you, but if they are living, one of your parents should make this affidavit. If the doctor or midwife who attended at your birth is living, he or she may make this affidavit if your parents are dead. *Whoever signs this affidavit must be older than you are and must state the reason he knows the statements about your birth to be true.*

4. For the certificate to be acceptable by all agencies asking for them and for all purposes, the certificate must show unquestionable proof of your birth date and birth place. *This proof is in addition to the two affidavits appearing on the other side of this form* which are referred to in paragraphs 2 and 3 above. *This additional proof cannot be affidavits, but must be obtained from at least two documents.* Any two of the types of records listed below may be used to prove your date and place

of birth provided they are *at least one year old and bear your name and contain the proof.* If certified copies, sworn statements about the original evidence or photostatic copies instead of the original record are submitted, the date the original record was made (or its approximate age) and the date that the copy or abstract was made and the location and custodian of the original document must be shown. The reviewing official (probate judge, custodian, etc.) can prepare this certification for you. Certified statements not bearing the seal of the custodian or reviewing official must be on the official stationery or letterhead of the organization or agency.

a. Physician's or hospital *record.*

b. Birth certificate of registrant's children.

c. Baptismal, cradle roll, or other church records.

d. Local, state or federal census records.

e. School record (entrance or census record).

f. *Insurance* policy or application or statement from the company.

g. Family Bible record (if authentic, old, inspected and certified by a probate judge, health officer or similar public official).

h. Employment or social security record.

i. Military discharge record.

j. Voting registration.

k. Marriage license *application.*

l. Any authentic record containinng required proof.

Remember—you are establishing your birth record and it is no stronger than your supporting evidence. You should furnish the best proof that you can assemble even though it may require additional time and effort. *Your certificate positively cannot be accepted for filing unless you submit at least two*

documents which individually or together give proof of birth date and birth place. This is according to Title 22, Section 39 of the 1940 Code of Alabama, as amended. *No document less than one year old will be accepted as proof.*

5. Do not mail any of the above mentioned items until you are able to send them all together in one envelope. These are:

a. The delayed certificate of birth, prepared as directed in paragraphs 1, 2 and 3 above.

b. Two or more pieces of the oldest documentary proof that you have as referred to in paragraph 4 above—this proof must be at least one year old.

c. A money order for fifty cents or more depending upon the number of copies wanted. Certified copies are issued only upon receipt of the statutory fee of fifty cents for each copy. Fee must be by *money order* made payable to the State Registrar of Vital Statistics.

d. Address mail to the Bureau of Vital Statistics, State Health Department, Montgomery 4, Alabama.

CAUTION—Be sure to write the name and address of the sender in the space provided on the certificate. This is important. Do not fill in any of the space on the certificate below the line that reads "(Do not write below this line)." Follow the above instructions.